IN THE SUPREME COURT OF MISSOURI

NO. SC91160

DENNIE L. CAROTHERS,

RESPONDENT,

v.

PAMELA CAROTHERS,

APPELLANT.

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF MACON COUNTY, MISSOURI
41ST JUDICIAL CIRCUIT
THE HONORABLE JAMES P. WILLIAMS, JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

JAMES MCCONNELL, MB# 28133
127 East Walnut - P O Box 137
Shelbina, Missouri 63468
573.588.2115
573.588.2116 (fax)
Email: jmcconn@mcmsys.com
COUNSEL FOR RESPONDENT

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STATEMENT OF FACTS

Appellant Pamela Carothers was granted a judgment dissolving the marriage with Respondent Dennie L. Carothers by the Macon County Circuit Court on June 30, 1993 in case number 41V019200101 (L.F.6). Appellant Pamela Carothers was also granted a judgment for damages against Respondent Dennie L. Carothers in case 41V019600131 in the total amount of $12,687.50 on December 29, 1999 in Macon County, Missouri. (L.F.18). From 2005 to 2009 and other years the Appellant garnished the wages of Respondent resulting in monies being withheld from Respondent's paycheck and paid over to Appellant through the Court. Respondent still owed Appellant $13,035.97 counting interest in case number 41V019600131 as of December 14, 2009. (L.F.18-19).

In their dissolution case, Appellant had been ordered to pay child support to Respondent. (L.F. 6-12). On September 3, 2009, Respondent filed a Motion for Contempt alleging that Appellant Mother owed child support to Respondent for the support of their child, Cameron. In addition to the child support, Respondent requested the court to order Appellant to pay certain medical and dental expenses and other obligations, to determine the exact amount of all sums owing by Appellant to Respondent in the dissolution case, plus legal interest. (L.F. 13-14). The trial court ordered a Show Cause Hearing for October 28, 2009. (L.F. 15). On October 28, 2009, the Respondent appeared pro se and the hearing was rescheduled for December 14, 2009. (L.F. 3). A show-cause hearing on Respondent's Motion for Contempt was held on December 14, 2009 with Appellant appearing pro se.

(L.F. 3).

On January 12, 2010, the trial court entered a Judgment of Contempt finding Appellant in contempt of the judgments of that court and ordered her to pay child support and that she should be incarcerated in the county jail until such contempt is purged. (L.F.17-19). The Judgment further stated that Appellant may purge herself of contempt by relinquishment of any right to the sum of $2,879.14 being held in the Clerk's registry and filing a Satisfaction of Judgment for the judgment held by Appellant against Respondent in case number 41V019600131 on or before January 25, 2010 at 10:00 A.M. The Judgment of Contempt was stayed until January 25, 2010 at 10 A.M. (L.F. 19). It was further ordered that a Warrant for Commitment be issued incorporating the Judgment and authorizing the Appellant's incarceration and said Warrant of Commitment was in fact signed January 12, 2010. (L.F.19-21) The docket sheet of the trial court shows that a copy of the Judgment of Contempt was mailed to Appellant on January 13, 2010. (L.F. 3). The Circuit Clerk sent the Warrant of Commitment to the Macon County Sheriff's Department together with a copy of a Satisfaction of Judgment form and the Judgment of Contempt on February 1, 2010. (L.F.3).

On February 11, 2010 the first Notice of Appeal was filed by Appellant in case number WD72175 (L.F. 22-29). A letter was sent from the Western District Court of Appeals Staff Counsel dated March 9, 2010 with no reply from Appellant or supplementation to explain finality of the Judgment of Contempt. (App.6). On March 24, 2010, Appellant voluntarily withdrew her first appeal and the Western District Court of Appeals dismissed

that appeal March 25, 2010. (L.F. 4).

On March 31, 2010, the Appellant was taken into custody on the Warrant of Commitment dated January 12, 2010 and the trial court set a bond pending appeal. (L.F. 4, 39, 40). Appellant then filed her second Notice of Appeal to create WD72341 on April 6, 2010 challenging the trial court's Judgment of Contempt. (L.F. 5,33-42). A second letter dated July 9, 2010 was sent from Staff Counsel with the Western District Court of Appeals questioning the timeliness of the appeal. (App. 8). Suggestions were filed with the Western District Court of Appeals concerning time limits for appeals by both parties resulting in an order August 5, 2010 dismissing the second appeal as untimely under Rules 81.04 and 81.05. Appellant requested reconsideration and/or transfer to the Supreme Court which was denied by the Western District Court of Appeals. This court accepted transfer.

POINTS RELIED ON

I. THE WESTERN DISTRICT COURT OF APPEALS PROPERLY DISMISSED

APPELLANT'S SECOND APPEAL BECAUSE HER SECOND APPEAL WAS NOT TIMELY IN THAT APPELLANT'S NOTICE OF APPEAL WAS FILED MORE THAN TEN (10) DAYS AFTER THE JUDGMENT OF CONTEMPT BECAME FINAL FOR PURPOSES OF APPEAL.

Missouri Supreme Court Rule 81.04

Missouri Supreme Court Rule 81.05

Emmons v Emmons, 310 S.W.3d 718 (Mo. App. W.D. 2010)

In re the Marriage of Crow & Gilmore, 103 SW 3rd 778 (Mo. 2003)

II. THE TRIAL COURT PROPERLY FOUND APPELLANT IN CONTEMPT OF ITS JUDGMENT AND ORDERED HER COMMITMENT UNLESS SHE

PURGES HERSELF OF CONTEMPT IN THAT THE TRIAL COURT FOUND THAT DURING PERIODS OF TIME APPELLANT WAS TO PAY CHILD SUPPORT SHE HAD ACCESS TO EARNINGS AND MONIES THAT WERE NOT REMITTED TO CHILD SUPPORT AND THAT SHE HAD WILLFULLY AND CONTUMACIOUSLY REFUSED TO PAY THE CHILD SUPPORT ORDERED AND THAT SHE COULD PURGE HERSELF OF CONTEMPT BY RELINQUISHMENT TO MONEY BEING HELD IN THE CLERK'S REGISTRY AND FILING A SATISFACTION OF JUDGMENT WHICH APPELLANT HAD THE PRESENT ABILITY TO PERFORM.

Owsley v Owsley 639 S.W. 2nd 897 (Mo. App. S.D. 1985).

Mayfield vs Mayfield 780 S.W. 2nd 139 (Mo. App. S.D. 1989)

III. THE TRIAL COURT PROPERLY FOUND APPELLANT IN CONTEMPT OF ITS JUDGMENT BECAUSE THE COURT ADVISED MOTHER OF HER

RIGHT TO COUNSEL AND GAVE APPELLANT A CONTINUANCE TO SEEK COUNSEL AND RESPONDENTS MOTION GAVE APPELLANT SUFFICIENT NOTICE OF THE ALLEGATIONS REGARDING CHILD SUPPORT ARREARAGE TO FULFILL DUE PROCESS REQUIREMENTS.

Cheatham v Cheatham, 101 S.W.3d 305 (Mo. App. E.D. 2003)

Smith vs Kintz 245 S. W. 3d 257 (Mo. App., 2008)

Missouri Supreme Court Rule 81.06

I. THE WESTERN DISTRICT COURT OF APPEALS PROPERLY DISMISSED APPELLANT'S SECOND APPEAL BECAUSE HER SECOND APPEAL WAS

NOT TIMELY IN THAT APPELLANT'S NOTICE OF APPEAL WAS FILED MORE THAN TEN (10) DAYS AFTER THE JUDGMENT OF CONTEMPT BECAME FINAL FOR PURPOSES OF APPEAL.

ARGUMENT

Missouri Supreme Court Rule 81.04 and **Section 512.050 RSMo** both indicate that Notice of Appeal shall be filed not later than ten (10) days after the judgment or order being appealed from becomes final. **Missouri Supreme Court Rule 81.05** indicates that a Judgment becomes final thirty (30) days after entry if no timely authorized after-trial motion is filed. **Section 512.020(5) RSMo** indicates that a party may appeal from any special order after final judgment in the cause.

To determine whether or not an appeal is timely, one must first determine when the order is final for the purposes of appeal. The case of **Melson v. Melson** 292 SW3d 375 (Mo App 2009) correctly states the standard that a civil contempt order becomes final for the purpose of appeal when it is enforced by actual incarceration **or** an order of commitment is issued that is not stayed. That is also decided in **Eaton v. Bell**, 127 S.W.3d 690 (Mo App 2004) and **Cohen v. Cohen**, 178 S. W. 3d 656 (Mo App 2005). As a result, in this case the stay was lifted January 25, 2010 at 10:00 am and the January 12, 2010 contempt order became final for appeal thirty days after it was signed.

The court in **Melson** is quoting **In re the Marriage of Crow & Gilmore**, 103 SW 3rd 778(Mo.2003) where the court states that it "has intimated that an order of commitment is

sufficient to "enforce" a contempt order. In issuing an order of commitment, the trial court imposes the specific remedy - incarceration. At this point, the contempt order changes from a mere threat to "enforcement," and becomes final and appealable." Since the Judgment of Contempt was stayed until January 25th, 2010 at 10 A.M., Appellant's liberty became at risk after that date and time. She has two choices - either purge herself of contempt or go to jail if she was apprehended. Once incarcerated, she held the keys to the jail if she were to sign the Satisfaction of Judgment and release the funds being held by the Clerk of the Court.

In this case, Respondent Dennie L. Carothers filed the Motion for Contempt against the Appellant Pamela Carothers to determine the total amount of sums owed by her to him in their dissolution action for support and other matters and to try to compel payment or setoff against the judgment that he owed Appellant in the separate case. The Appellant is attempting to appeal the Judgment of Contempt entered January 12th, 2010 which was ordering her incarcerated for contempt unless she would purge herself of contempt prior to January 25th, 2010 at 10:00 A.M. Civil contempt is an order that may be appealed as a special order after final judgment in the cause as referred to in **Section 512.020 RSMo**. The Judgment of Contempt issued January 12th, 2010 was final thirty (30) days later under **Supreme Court Rule 81.05** and the appeal of that judgment would need to be noticed within ten (10) days after the judgment became final under **Supreme Court Rule 81.04** or by February 21st, 2010. Appellant's first notice of appeal entered February 11th, 2010 was probably within the time limits of the rules and statutes. One might argue that the ten days contemplated by **Section 512.020(5) RSMo** started to run on January 25, 2010 making the

deadline February 4, but that would be contrary to the thirty days given in **Supreme Court Rule 81.05.** Staff Counsel for the Western District did not yet have the legal file to give them a more complete reference on the facts and procedures of the trial court when the first letter inquiring about the timeliness was sent. They were expecting more information on the issue.

The April 6th, 2010 Notice of Appeal is untimely. The January 12th, 2010 Judgment became final thirty (30) days later even though it stayed until January 25th, 2010. Since the commitment was effective January 25th, 2010 Appellant only had ten (10) days to file a timely appeal after the first thirty days had run, so anything filed after February 21st, 2010 would be untimely. Appellant tries to argue that the contempt judgment was interlocutory until she was actually incarcerated March 31st, 2010. That position is contrary to the case law cited in this point. While some of the cases in this area do not define their language to specify that the enforcement begins on the issuance of an order of commitment or by actual incarceration, a closer inspection of the case law shows clearly that either of those conditions are sufficient to enforce the judgment of contempt and make it become final and appealable. Appellant only quotes the portions of **Emmons v. Emmons,** 310 S.W.3d 718 (Mo. App. W.D. 2010) that she chooses rather than the entire case because that case indicates the issuance of an order of commitment is also sufficient to enforce a contempt order and it is quoting both **Eaton** and **In Re the Marriage of Crow**.

Appellant was noticed into court before Judge Williams in the damages case concerning Motions to Quash Respondent's garnishment and for the court to enter the

Satisfaction of Judgment when she appeared March 31st, 2010. Appellant did not seek commitment but Respondent did ask that the court incarcerate her on the Warrant for Commitment, but set a bond if she were to attempt to appeal. All that is irrelevant to the issues because her time to notice the appeal had run.

II. THE TRIAL COURT PROPERLY FOUND APPELLANT IN CONTEMPT OF IT'S JUDGMENT AND ORDERED HER COMMITMENT UNLESS SHE PURGES HERSELF OF CONTEMPT IN THAT THE TRIAL COURT FOUND THAT DURING PERIODS OF TIME APPELLANT WAS TO PAY CHILD

SUPPORT SHE HAD ACCESS TO EARNINGS AND MONIES THAT WERE NOT REMITTED TO CHILD SUPPORT AND THAT SHE HAD WILLFULLY AND CONTUMACIOUSLY REFUSED TO PAY THE CHILD SUPPORT ORDERED AND THAT SHE COULD PURGE HERSELF OF CONTEMPT BY RELINQUISHMENT TO MONEY BEING HELD IN THE CLERK'S REGISTRY AND FILING A SATISFACTION OF JUDGMENT WHICH APPELLANT HAD THE PRESENT ABILITY TO PERFORM.

When a former spouse proves that the other party has failed to make required payments under a dissolution, a prima facie case of contempt has been shown. The other party has the burden of proving inability to make the payments and that being in that position did not occur intentionally or contumaciously. **Owsley v Owsley** 639 S.W. 2nd 897 (Mo. App. S.D. 1985)**.**

The trial court heard the testimony of both parties and took judicial notice of the court records. The Respondent proved by records of the court, testimony and the admissions of Appellant that she had failed to pay all sums of child support due. The burden of proof shifted to Appellant to prove she was not able to make the required payments. The garnishment records from the damage case showed that Appellant was receiving several thousands of dollars through the years from garnishing Respondent's wages. Testimony at prior Motions to Modify, findings and orders showed income and ability to pay support for Cameron that was not paid through the court as ordered. Appellant currently had $2,879.14 being held in the clerk's registry that had been garnished from Respondent's wages and an

additional garnishment was pending at the time of the hearing. While there was not extensive evidence about Appellant's present ability to pay child support brought forward by Appellant, there was evidence available to the court that allowed Appellant to pay substantial amounts toward the child support obligation. The Satisfaction of Judgment was something Appellant had a present ability to do and reasonably would have paid the majority of the child support judgment.

A moving party in a motion for civil contempt has the burden of proof by the preponderance of the evidence. Courts consider these matters based on the facts on a case by case basis. Once the prima facie case has been made, the burden shifts and the other party stands in a position of unique and personal knowledge of the facts that might sway a court on the issues of present ability to pay. A motion for civil contempt is addressed to the sound discretion of the trial court, and on review its judgment will not be disturbed in the absence of a clear abuse of discretion. **Mayfield vs Mayfield** 780 S. W. 2nd 139 (Mo. App. S.D. 1989) The scope of Appellate review is the same that would apply to other court-tried cases. Appellate courts should give deference to the judge who heard the evidence in most cases.

III. THE TRIAL COURT PROPERLY FOUND APPELLANT IN CONTEMPT OF ITS JUDGMENT BECAUSE THE COURT ADVISED MOTHER OF HER RIGHT TO COUNSEL AND GAVE APPELLANT A CONTINUANCE TO SEEK COUNSEL AND RESPONDENTS MOTION GAVE APPELLANT SUFFICIENT NOTICE OF THE ALLEGATIONS REGARDING CHILD

SUPPORT ARREARAGE TO FULFILL DUE PROCESS REQUIREMENTS.

The record made by the trial court is made less complete than it should be on the issue of the court advising Appellant of her right to counsel. The order to show cause issued September 14, 2009 set the matter for hearing on October 28, 2009 (L.F.15). Respondent's counsel is unaware but doubtful of whether or not a recording was made that date, but recalls appearing in court October 28, 2009 where the Appellant appeared without counsel and was advised by Judge Williams of her right to a lawyer to assist her in this hearing. She requested a continuance to obtain counsel and it was granted to December 14, 2009 at 1 p.m. (L.F. 3). On December 14, 2009, there was a discussion with the parties prior to the record being made wherein the Judge inquired whether Appellant was ready to proceed and she indicated that she was. She indicated that she did not have an attorney, but she was willing to proceed without one. In hindsight, it would have been better if the court had made a record of that conversation, but the transcript does not reveal those conversations with Appellant.

Respondent agrees that the standard for representation by counsel is properly set forth

in **Cheatham v Cheatham**, 101 S.W.3d 305 (Mo.App. E.D. 2003) and **Smith vs Kintz** 245 S.W. 3d 257 (Mo. App., 2008).

Respondent believes that the Motion for Contempt was adequate to notify Appellant

of the issues in the contempt action and in particular as to child support being in arrears. Appellant had been in court numerous times and received copies of Judgments modifying child support as was shown by the court files and her testimony consenting to the admission of Respondent's exhibits. Appellant was given additional time to prepare for the hearing and obtain counsel if she had chosen to do so. This issue was not raised in either Notice of Appeal.

This Court's ability to consider both points two and three presented by Appellant are dependent upon the issues in point one. Whether or not Appellant is deemed to have properly perfected the Appeal is the threshold question that must first be answered. Appellant has not requested relief at any stage under **Supreme Court Rule 81.06** to allow an appeal out of time and it is too late since more than six (6) months has elapsed since this judgment became final. Accordingly the order of this court should be to affirm the dismissal entered by the Western District Court of Appeals as untimely and not consider points two or three.

CONCLUSION

For the reasons cited herein, Respondent Dennie L. Carothers respectfully requests an order from this court finding that Appellant was untimely in filing her Appeal, that the Western District Court of Appeals properly dismissed her Appeal, confirming the trial courts

Judgment of Contempt and for such other and further orders at the Court deems just and proper in the premises.

RESPECTFULLY SUBMITTED:

_____
JAMES MCCONNELL, MB# 28133
127 East Walnut - P O Box 137
Shelbina, Missouri 63468
573.588.2115
573.588.2116 (fax)
Email: jmcconn@mcmsys.com
COUNSEL FOR RESPONDENT

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RESPONDENT'S CERTIFICATE OF SERVICE OF RESPONDENT'S SUBSTITUTE BRIEF

The undersigned certifies that the foregoing Respondent's Substitute Brief and cd of the Brief was sent priority mail, postage prepaid, to the following attorney of record this 7th day of January, 2011:

Seth Shumaker
716 South Baltimore
Kirksville, MO 63501
ATTORNEY FOR APPELLANT

JAMES MCCONNELL, MB# 28133
127 East Walnut - P O Box 137
Shelbina, Missouri 63468
573.588.2115
573.588.2116 (fax)
Email: jmcconn@mcmsys.com
COUNSEL FOR RESPONDENT

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RESPONDENT'S CERTIFICATION OF COMPLIANCE OF RESPONDENT'S SUBSTITUTE BRIEF

The undersigned certifies that the foregoing Respondent's Substitute Brief complies with Supreme Court Rules 84.06 and 55.03 and that the brief contains 3422 words and 569 lines and was composed in Word Perfect 10. The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

JAMES MCCONNELL, MB# 28133
127 East Walnut - P O Box 137
Shelbina, Missouri 63468
573.588.2115
573.588.2116 (fax)
Email: jmcconn@mcmsys.com
COUNSEL FOR RESPONDENT